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No. 203

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In the

Supreme Court of the United States

OCTOBER TERM, 1965.

WILLIAM JOSEPH BREAULT and
BONNIE JO ELLEN KATHRYN BREAULT,
Petitioners,

vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as Executors and Trustees under the Last Will and Testament of KATHRYN M. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Executor of the Last Will and Testament of OSCAR J. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Trustee and EUGENE A. BUSCH, Successor Trustee under the Last Will and Testament of OSCAR J. BREAULT, deceased; IRMA MEYERS, LITTLE SISTERS OF THE POOR OF CHICAGO, ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS, POLISH MANUAL TRAINING SCHOOL FOR BOYS, ESTELLE ANGELA BREAULT, KENNETH BREAULT and WESLEY MEMORIAL HOSPITAL, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

WILLIAM JOSEPH BREAULT and
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vs.

HAROLD L. FEIGENHOLTZ and RICHARD DAHM, individually and as Executors and Trustees under the Last Will and Testament of KATHRYN M. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Executor of the Last Will and Testament of OSCAR J. BREAULT, deceased; HAROLD L. FEIGENHOLTZ, as Trustee and EUGENE A. BUSCH, Successor Trustee under the Last Will and Testament of OSCAR J. BREAULT, deceased; IRMA MEYERS, LITTLE SISTERS OF THE POOR OF CHICAGO, ST. HEDWIG INDUSTRIAL SCHOOL FOR GIRLS, POLISH MANUAL TRAINING SCHOOL FOR BOYS, ESTELLE ANGELA BREAULT, KENNETH BREAULT and WESLEY MEMORIAL HOSPITAL, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 21, 1966, which affirmed (a)

the denial of a petition to approve the settlement of controversies among all of the beneficially interested parties to said controversies, (b) a declaratory judgment and (c) the dismissal of a count in the Amended Complaint seeking an accounting from trustees.

I.

CITATIONS TO OPINIONS BELOW.

The opinion of the district court is printed in the Appendix (App. 121-142) prepared for the use of the court below, filed pursuant to paragraph 3 of Rule 21 and is reported in 250 F. Supp. 551. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 1a, is reported in 358 F. 2d 39.

II.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 21, 1966 (App.B., *infra*, p. 13a). Timely petitions for rehearing and rehearing *en banc* were denied on April 13, 1966 (App.C and D, *infra*, pp. 14a-15a). The mandate of the court below has been stayed (App.E., *infra*, p. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

III.

THE QUESTIONS PRESENTED.

A. Did the Court of Appeals deprive Kentucky children of the right to have their diversity action against an Illinois attorney, well known to the bench and bar of Illinois, decided under applicable Illinois decisions?

1. Did the Court of Appeals err in refusing to follow the leading case of *Wolf* v. *Uhlemann*, 325 Ill. 165, 156 N.E. 334 in which a settlement of a genuine controversy over the validity of a spendthrift trust was approved?

2. Did the Court of Appeals err when it "rejected" *Tree* v. *Continental Illinois National Bank and Trust Company*, 346 Ill.App. 509, 105 N.E. 324 "insofar as *Tree* indicates that such a trust could be abrogated under the family settlement doctrine if there was substantial doubt as to its validity"?

3. Did the Court of Appeals err when it held that the controlling Illinois precedent was *Altemeier* v. *Harris*, 403 Ill. 345, 355, 357 which involved a spendthrift trust that long since had been judicially validated and construed and was not the subject of a genuine controversy and in which *Wolf* v. *Uhlemann*, 325 Ill. 165 was not distinguished in the manner recited by the Court of Appeals?

4. Was there a plain misinterpretation of Illinois decisions which did violence to the principal that in diversity cases federal courts must follow state law?

B. Was it proper for the Court of Appeals to affirm the dismissal of Count II of petitioners' amended complaint containing unanswered allegations showing that petitioners are children of Oscar Breault, deceased, entitled as his descendants to their intestate share of his estate if his contested will was unduly influenced, that Oscar was entitled to the net income of his mother's testamentary trust in his lifetime, that Oscar did not receive all of such income, that no proper accounting was made to him in his lifetime and praying for an accounting from the inception of the trust and such other and further

relief as they may show themselves entitled to receive, particularly when the Supreme Court of Illinois in *In re Estate of Breault,* 29 Ill.2d 165, 180 has held that petitioners "are not without a remedy or a tribunal to pursue such claims should they so desire" and the Appellate Court of Illinois in an intervening decision, *In re Estate of Breault,* 63 Ill.App.2d 246, 261, has held that Count II seeks such complete accounting?

IV.

The Constitutional Provision Involved:

Article III, Sec. 2.

"The judicial Power shall extend • • • to Controversies • • • between Citizens of different States • • •."

V.

The Statute Involved:

The Rules of Decision Act, 28 U.S.C. Sec. 1652.

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." June 25, 1948, c. 646, 62 Stat. 944.

VI.

STATEMENT OF THE CASE.

A. FEDERAL JURISDICTION.

Petitioners are citizens of Kentucky and respondents are citizens of Illinois. (App. 73). The amount in controversy is greatly in excess of $10,000.00 exclusive of interest and costs. (App. 74). Diversity jurisdiction of the District Court was invoked under 28 U.S.C. Sec. 1332.

B. THE KATHRYN BREAULT TESTAMENTARY TRUST.

Petitioners' grandmother, Kathryn Breault, was the owner of a substantial unincorporated business operated under the name "Brolite Company" (App. 34).

Shortly before Kathryn's death on August 3, 1952, the respondent, Harold L. Feigenholtz, of Chicago, Illinois became her attorney, obtained a power of attorney from her, discharged the manager of the business and assumed personal charge of its operation. (App. 35).

Kathryn executed a will dated July 22, 1952 (App. 39-48) giving the bulk of her substantial estate to Feigenholtz and Richard Dahm, as trustees, directing them to pay all of the net income to her son, Oscar J. Breault, "from the time of my death and as long as he shall live." (App. 44).

The will provided that all payments of income or distribution of principal to Oscar should be made to him "in person or upon his personal receipts." (App. 45-46). The will included the following provisions:

"At any time after three years of administration of this Trust, the Trustees named herein or their successors, feel that my said son, Oscar J. Breault, has become competent to personally handle the corpus of this Trust, the aforesaid Trustees are hereby given the power to terminate this Trust and to deliver to my said son, the entire corpus of this, my Trust." (App. 46).

"The Trustees shall not by reason of being such Trustees be disqualified to act as officer or director of any corporation in which the trust estate has stock in (sic) or to receive compensation from the said corporation for services rendered." (App. 41).

"In the event of any suit, directly or indirectly instituted by any beneficiary or beneficiaries hereunder against the Trustees to construe this trust or to terminate this trust, the cost, expenses and charges in connection with the said litigation shall be paid by the said beneficiary or beneficiaries and be deducted from said beneficiary or beneficiaries' distributive share." (App. 43).

"Upon the death of my son, Oscar J. Breault, the property of the Trust Estate shall be distributed according to the provisions and terms of the Last Will and Testament of my said son, Oscar J. Breault, and if he shall fail to execute a Will, or if such Will shall not be admitted to probate, I hereby direct distribution of the Trust Estate in the following manner:

One-third [thereof to each of three named charities]." (App. 45).

Prior to Kathryn's death, Feigenholtz and respondent, Eugene A. Busch, his nephew and law associate, organized an Illinois corporation called the Brolite Company, which remained a corporate shell until Kathryn's death when Feigenholtz and Busch caused the bank accounts of her sole proprietorship business to be transferred to the corporation and the business to be operated in the corporate form (App. 34-35).

Feigenholtz and respondent Dahm elected themselves and Busch as directors of the corporation. Feigenholtz became president and began to receive substantial salary, bonuses, travel expenses and counsel fees, (App. 35, Transcript of proceedings, April 22, 1965, page 30) for which he has never accounted, although required to do so under Illinois decisions, *Stone* v. *Baldwin,* 348 Ill.App. 225, 239, 243 (appeal denied 351 Ill.App. xvii). Feigenholtz and Dahm have never purported to account to anyone or to any court for the operation of or the income of the Brolite Company (App. 32-34). In 1960 petitioners were permitted to see income tax returns of the corporation caused to be filed by Feigenholtz for the five fiscal years beginning July 31, 1956 and ending July 31, 1960 and these show that the net earnings of said business during that period were more than $1,239,000. and that the net income after taxes was almost $700,000. (App. 35-36).

Oscar testified in a deposition on August 20, 1957 that the trustees paid him sometimes $100., sometimes $125. per week, sometimes less, that whatever he did receive depended on their discretion, (App. 34), that he had not paid more than $150. per month of the $300. per month allowance for the support of his children (petitioners herein) because he did not have the money but would have paid it if he had it. (App. 34).

C. THE CONTESTED WILL.

Oscar executed a purported will in Feigenholtz's law office dated November 18, 1954. He was then entirely dependent for his income upon what he received from the trustees under his mother's will. The purported will gives his personal estate and the appointed property

to Feigenholtz as trustee of a spendthrift trust (App. 49) and names Busch as successor trustee (App. 56).

The will gives "the net income from the Trust Estate" to Oscar's third wife, Estelle (App. 53).

It further provides as follows:

> "Upon the death of my wife, the Trustee shall distribute the net income from the Trust Estate to my beloved children, KENNETH BREAULT, WILLIAM JOSEPH BREAULT and BONNIE CATHERINE (sic*) BREAULT in equal installments not less frequently than quarter-annually up to the time that the youngest of my surviving children shall have attained the age of forty (40) years.
> (d) At the date that the youngest of my surviving children shall have attained the age of forty (40) years, the Trustee shall distribute the remaining principle of the Trust:" [five percent to KENNETH, five percent to WILLIAM JOSEPH BREAULT and five percent to BONNIE JO ELLEN "CATHERINE" BREAULT and eighty-five percent to WESLEY MEMORIAL HOSPITAL].
>
> "(e) In the event one of my beloved children predeceases me, or dies prior to the distribution of the principal of the Trust Estate, then and in that event his or her portion of the income or principal of the Trust Estate shall be then divided among my remaining children.
>
> "(f) In the event all of my beloved children shall die prior to the age of forty (40) years, this Trust shall terminate and the entire principal and accumulations of the Trust shall be forthwith distributed to WESLEY MEMORIAL HOSPITAL, an eleemosynary institution." (App. 53-54).

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* The name of Oscar's daughter, a petitioner herein, is spelled the same as Oscar's mother, Kathryn (Appendix 130, 250 F.Supp. 551-566) not Catherine, as it is spelled eleven times in Oscar's purported will.

The will drawn in Feigenholtz's law office substantially copies Kathryn's will, including grammatical errors. Like Kathryn's, it permits the trustee to be an "officer or director of any corporation in which the Trust Estate has stock in (sic) or to receive compensation from the said corporation for services rendered" (App. 50) and provides:

> "In the event of any suit, directly or indirectly instituted by any beneficiary or beneficiaries hereunder against the Trustee to construe this trust or to terminate this trust, the cost, expenses and charges in connection with the said litigation shall be paid by the said beneficiary or beneficiaries and be deducted from said beneficiary or beneficiaries' distributive share." (App. 52-53).

Unlike Kathryn's will, it provides as follows:

> "In the event of any suit, directly or indirectly, instituted by any beneficiary or beneficiaries against the Executor to construe the Will, or to terminate the Will, or to have the Will declared invalid, the cost, expense and charges in connection with the said litigation shall be paid by the said beneficiary or beneficiaries and shall be deducted from the said beneficiary's or beneficiaries' share." (App. 56).

Unlike Kathryn's will, it waives surety bond for the executor. (App. 56-57).

D. FEIGENHOLTZ'S EXECUTORSHIP.

Oscar died on July 16, 1959 and the purported will was admitted to probate on October 14, 1959. Kathryn's trust estate then included all of the stock in the Brolite Company. *In Re Estate of Breault*, 29 Ill.2d 165, 168.

After paying fees to themselves and their attorney, Busch, and the balance in their trustees' bank account

to Feigenholtz as administrator to collect of Oscar's estate, Feigenholtz and Dahm rendered a so-called account as of October 21, 1959 showing a zero balance which Feigenholtz, as administrator to collect, improperly approved on behalf of the estate. *In Re Estate of Breault,* 29 Ill.2d 165, 179.

An inventory was filed March 9, 1960, listing not only Oscar's personal assets but also all of the appointed assets as "property of the decedent" the total assets being fixed as in excess of $500,000.00. *In Re Estate of Breault,* 29 Ill.2d 165, 169.

E. THE "TURNING POINT" (29 Ill. 2d 165, 169).

On July 1, 1960, petitioners, then aged 16 and 14, respectively, by their mother, Florence, Oscar's divorced second wife, as next friend and guardian, all being Kentucky citizens, filed a will contest in the United States District Court for the Northern District of Illinois. Federal jurisdiction was asserted on the ground that there was diversity of citizenship and the amount in controversy was in excess of $10,000., exclusive of interest and costs. The complaint alleged that the execution of Oscar's purported will had been procured by undue influence on the part of Feigenholtz. (App. 77).

F. FEIGENHOLTZ'S EXECUTORSHIP CONTINUED.

Eleven days later, Feigenholtz filed an amended inventory in Oscar's estate, distinguishing between Oscar's personal assets fixed at $25,805. and the property over which Oscar had a "power of appointment or disposition." At the same time, Feigenholtz and Dahm, as trustees under Kathryn's will, filed their claims exceeding the amount of Oscar's inventoried personal estate, which

Feigenholtz, as executor, consented to and which were allowed in an *ex parte* hearing. Feigenholtz then filed a motion in the district court to dismiss the will contest, alleging that the jurisdictional amount was not involved in that Oscar's personal estate was insolvent and that if petitioners won the will contest, the three charities named in Kathryn's will would take the appointive estate to the exclusion of petitioners as Kathryn's and Oscar's heirs. *In Re Estate of Breault,* 29 Ill.2d 165, 170. (App. 78).

Alleging that Feigenholtz *inter alia* was fraudulently attempting to oust the Federal Court of its jurisdiction, petitioners filed a *statutory** proceeding in the Probate Court of Cook County to remove him as executor. *In Re Estate of Breault,* 29 Ill.2d 165, 170.

In the course of the removal proceedings, Feigenholtz, as executor, filed his first account, alleging therein that the estate had no claim against him and Dahm as trustees under Kathryn's will for any unpaid income. *In Re Estate of Breault,* 29 Ill.2d 165, 171, 179.

The Probate Court of Cook County denied the petition to remove him but ordered Feigenholtz to post an $800,000. bond with surety pursuant to an Illinois statute, Chapter 3, Illinois Revised Statutes 1961 par. 150, permitting the court to require surety when a will waives such when the court "from its own knowledge or the suggestion from any interested person has cause to suspect him of fraud or incompetence or believes the estate of decedent will not be sufficient to discharge all the claims against the estate."

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* Chap. 3, Ill. Rev. Stat. 1961, par. 276 (Amended in 1965 to provide as a ground for removal: "other good cause.")

The Probate Court ordered Feigenholtz to inventory and account for the appointive property and disapproved his executor's account as amended.

Feigenholtz appealed from all parts of the order except that denying the petition for removal.

The Supreme Court of Illinois, *In Re Estate of Breault,* 29 Ill.2d 165, held that the purported will did not undertake to make the appointive property available for the payment of Oscar's debts and administration expenses (29 Ill.2d 165, 176), that the purported will did not manifest an intention to appoint Kathryn's trust property to Oscar's estate, and reversed that part of the Probate Court order requiring Feigenholtz as executor to inventory and account for the Kathryn Breault trust assets and to post an additional $800,000. bond with surety. (29 Ill.2d 165, 178).

The Supreme Court affirmed the disapproval of the accounting by Feigenholtz as executor (29 Ill.2d 165, 179) but recognized that the Probate Court of Cook County,* as it was then constituted had no equity jurisdiction to require an accounting from the inception of the trust, saying, however, that petitioners herein "are not without a remedy or tribunal to pursue such claims should they so desire." (29 Ill.2d 165, 180).

G. THE SUIT FOR DECLARATORY JUDGMENT AND ACCOUNTING.

Thereafter, in December 1963, petitioners filed an amended complaint in the instant case, which is a second diversity suit in the United States District Court for

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* Said Court became the Probate Division of the Circuit Court of Cook County on January 1, 1964.

the Northern District of Illinois, seeking in Count I a declaratory judgment with respect to the validity under the Rule Against Perpetuities of Kathryn's gift to the three charities, "if such will shall not be admitted to probate," the rights of the three charities to attack collaterally the order admitting the will to probate and the validity of the trust in Oscar's contested will. (App. 22-32, App. A., *infra*, page 6a).

Count II of the Amended Complaint was intended to seek an accounting from Feigenholtz and Dahm from the inception of the trust (App. 32-38; See *In re Estate of Breault*, 63 Ill.App.2d 246, 261).

The district judge ordered that a responsive pleading to Count II be deferred until further order of the court (App. 7-8) and none was ever filed.

The cause was tried as to Count I on a stipulation of facts by the Court without a jury (App. 73-101).

H. THE SETTLEMENT AGREEMENT.

Thereafter, before any decision and after repeated urgings by the district judge (Transcript of Proceedings, Feb. 2, 1965 pp. 6-7; Feb. 23, 1965) petitioners, on March 29, 1965, filed a settlement agreement, which had been entered into as of March 24, 1965, among them claiming interests as Kathryn's and Oscar's heirs; Estelle, Kenneth and Wesley Memorial Hospital named as beneficiaries in Oscar's will; and the three charities named in Kathryn's will, being all the parties claiming any beneficial interest in the estates of Kathryn and Oscar as heirs, legatees or beneficiaries. (App. 102-111).

Upon the objection of Feigenholtz, Dahm and Busch (App. 115) to the petition for the approval of the settlement agreement (App. 111) the district judge denied

the petition for the stated reason that "the Court does not have jurisdiction to destroy a spendthrift trust." (App. 121).

The district judge said that the settlement agreement is "an excellent one and if it didn't affect the spendthrift trust, I would not have any hesitancy to approve it, because I think it reflects a lot of progress, except I just cannot, in my legal conscience, approve it, knowing that there is no justification for it in the law and, as anxious as I am to work these things out, I am a lawyer first and at least I have to call them as I see them." (Transcript of Proceedings, April 22, 1965, page 19). As an alternative, he proposed a settlement which would give the three charities and Wesley Hospital the amounts provided for in the settlement agreement but would retain Feigenholtz as trustee, who could "distribute the net income of that trust estate to Estelle and the three children in accordance with any agreement they can make * * * without doing any violence to the spendthrift trust." He proposed the creation of two additional directors for the corporation permitting the petitioners to select one, Kenneth and Estelle the other (Transcript of Proceedings, April 22, 1965 pages 5-7).

I. THE DECISION ON THE MERITS.

On June 1, 1965, the district judge filed his written memorandum opinion incorporating findings of fact and conclusions of law (App. 13, 121, 350 F. Supp. 551). A decree based on the memorandum opinion was entered on July 1, 1965 (App. 14, 142).

In his opinion, the district judge said, "If the plaintiff's have no interest in their grandmother's estate and if they can establish none even if Oscar's will is declared

invalid, they have no right to relief sought under Count II, nor indeed could this court entertain 60 C 1060 [the Will Contest] should Oscar's probate estate be shown to be worth less than $10,000." (App. 123, 250 F.Supp. 551, 553).

The district judge sustained the provisions in Kathryn's will and in Oscar's contested will and held that should petitioners prevail in the will contest, the Kathryn Breault trust estate would pass to the three charities named in her will. Although no pleadings had been filed with reference to Count II, the district judge on his own motion ordered that Count dismissed. (App. 145).

J. THE DECISION OF THE COURT OF APPEALS.

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit urging the following points:

1. The District Judge erred or abused his discretion in refusing to approve the settlement agreement.
2. The District Judge erred in holding that plaintiffs have no interest in their grandmother's trust estate.
3. The District Judge erred in dismissing the count seeking an accounting.

Estelle Breault, Kenneth Breault, St. Hedwig Industrial School for Girls and Polish Manual Training School for Boys each sought to adopt petitioner's Point 1. Not having appealed, however, the court denied them leave to adopt Point 1 without prejudice to their right as appellees to confess error. Subsequently, Estelle and Kenneth filed Confessions of Error as to Point 1 and Estelle, Kenneth, St. Hedwig Industrial School for Girls and Polish Manual Training School for Boys sought to adopt portions of appellee's brief. Little Sisters of the

Poor, the third charity named in Kathryn's will filed no appearance as appellee.

The Court of Appeals affirmed. It held that the jurisdiction or authority of the federal court to approve the settlement agreement was controlled by *Altemeier* v. *Harris,* 403 Ill. 345, 86 N.E.2d 229, and that petitioners' reliance on *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, as controlling was misplaced. It said that in *Altemeier,* "the Court distinguished *Wolf* v. *Uhlemann,* 325 Ill. 165, 156 N.E. 334, and similar cases applying the family settlement doctrine with the observation that in those cases 'no spendthrift provisions [were] changed or set aside' (403 Ill. 345, 351)" (App. A, *infra,* p. 7a).

The fact is that both *Wolf* and *Altemeier* involved trusts for accumulation for the benefit of adults. *Altemeier* v. *Harris,* 335 Ill.App. 130, 132; *Altemeier* v. *Harris,* 403 Ill. 345, 351, and under Illinois decisions these are spendthrift trusts. *Bennett* v. *Bennett,* 217 Ill. 434, 442-443. *Commissioner of Internal Revenue* v. *Blair,* (CA 7) 60 F.2d 340; *Wagner* v. *Wagner,* 244 Ill. 101, 111; *Wallace* v. *Foxwell,* 250 Ill. 616, 627-629; *Altemeier* v. *Harris,* 403 Ill. 345, 352.

Altemeier did not distinguish *Wolf* v. *Uhlemann* in the manner recited by the court below. In *Altemeier* the Supreme Court referred to five Illinois cases involving simple wills with gifts directly to beneficiaries and in which no trusts were involved and said as to them, but not as to *Wolf* v. *Uhlemann* "It is observed that in every one of the cases just cited, wherein the family settlement doctrine is announced, no trust existed, and no contingent beneficiaries were interested, and no spendthrift provisions [were] changed or set aside." 403 Ill. 345, 351.

Wolf was in fact distinguished in *Altemeier* in the following manner:

> "In the case of *Wolf* v. *Uhlemann,* 325 Ill. 165, while a trust for accumulation was created by the will, yet the court reached its conclusion largely by reason of the extremely doubtful meaning of the will and the threatened litigation, together with a unanimous agreement to a family settlement. There was no discussion of the power to terminate a spendthrift trust or of the effect of a family agreement on contingent interests." 403 Ill. 345, 351.

In *Altemeier,* a family settlement patterned after the settlement approved in *Wolf,* was held invalid for the reason that there was no genuine controversy. The will had been sustained in a will contest terminated forty years earlier. The trust had been fully construed and validated by a decision of the Supreme Court of Illinois in *Smith* v. *Thomas,* 317 Ill. 150, twenty-four years earlier. It was held in *Altemeier* that the former decree was *res adjudicata* and binding on all of the parties to the so-called settlement agreement. *Altemeier* v. *Harris,* 335 Ill.App. 130, 153-154; *Altemeier* v. *Harris,* 403 Ill. 345, 354, 356-357. See Bogert, *Trusts* and *Trustees,* 2nd Ed. 1962, §1,009, p. 571 and James, *Illinois Probate Law and Practice,* 1951, §11.17, p. 101.

The Supreme Court affirmed the holding of the Appellate Court that there was no genuine controversy to be settled, but it also considered the question whether in the absence of such genuine controversy, the *sine qua non* of the family settlement doctrine, there could be a settlement. It followed the well-established rule announced in *Wolf,* 325 Ill. 165, 183, that the beneficiaries of a valid, uncontested spendthrift trust may not abrogate it merely for their own convenience. (403 Ill. 350-351)

The Court of Appeals said with reference to *Stein* v. *LaSalle National Bank,* 328 Ill.App. 3, 65 N.E.2d 216, that "many of the considerations the plaintiffs advance here were rejected." (App. A, *infra,* p. 8a).

In *Stein,* the court actually said at page 7:

> "Plaintiff and the guardian rely upon *Wolf* v. *Uhlemann,* 325 Ill. 165 to support their contention that the trial court had power to approve the settlement beneficial to the minors where all beneficiaries agree and only the trustee objects. The proceeding here is patterned after the one in that case. There, however, the court approved a compromise of threatened litigation between members of a family over a complex and involved will. In this case there is neither a family dispute nor a complex and involved will. There is no question, therefore, of subverting a trust to keep a family from being torn asunder. *Anderson* v. *Anderson,* 380 Ill. 488."

The Court of Appeals said with reference to *Thorne* v. *Continental Illinois National Bank & Trust Company,* 18 Ill.App.2d 163, 151 N.E.2d 398: "The spendthrift trust clauses were not struck down or destroyed. There was but an invasion of the corpus for settlement purposes, compatible with *Altemeier.*" (App. A, *infra,* p. 8a)

The settlement in *Altemeier* would not have terminated the trust. *Altemeier* v. *Harris,* 335 Ill.App. 138, 140-145; 81 N.E.2d 22, 27-29.

In *Thorne,* the court said at p. 175: "We do not believe the fact that the trusts in question contained 'spendthrift clauses' * * * should limit a court of equity in its directing an invasion of the corpus, as no case cited, which permitted deviation from trust provisions, indicated that spendthrift clauses are to be considered in any different category than other trust provisions when permitting the deviation from the corpus restrictions."

In *Thorne,* three cases cited by the trustee-appellant were *Altemeier, Stein,* and *Tree.* (Appellant's Brief in *Stein.*)

With reference to *Tree* v. *Continental Illinois National Bank & Trust Company,* 346 Ill.App. 509, 105 N.E.2d 324, the Court of Appeals said: "Insofar as *Tree* indicates that such a trust could be abrogated under the family-settlement doctrine if there was substantial doubt as to its validity, it appears to be inconsistent with the rationale of *Altemeier* and must be rejected as out of harmony with the controlling Illinois Supreme Court precedent." (App. A, *infra,* p. 9a).

In *Tree,* the Illinois Appellate Court made a statement of the issue before it as follows: (p. 520):

> "If the trust provisions in the instant will violate the Rule of Perpetuities, or if there is substantial doubt as to its validity, then there is merit in plaintiffs' position that the instant family settlement agreement, which the law favors (*Stepanowich* v. *Sleeth,* 349 Ill. 98, *Wolf* v. *Uhlemann,* supra), should be confirmed. On the other hand, if there is no such substantial doubt as to its validity, then the same objection applies, as stated by the Appellate Court in *Altemeier* v. *Harris, supra,* p. 154), and affirmed by the Supreme Court: 'If the Family Settlement Agreement here is approved and validated the effect would be that the members of the Stover family would be privileged to alter the terms and provisions of their ancestor's will merely for their own convenience and in order to secure greater individual financial advantages than those provided in the will and intended by the testator.' "

The Court of Appeals did not discuss other authorities cited by petitioners: Griswold, *Spendthrift Trusts,* 2nd Ed. 1947, §522, p. 600; 3 *Scott, Trusts,* 2nd Ed. 1956, §337.6, p. 2466; *Restatement of the Law of Trusts,* 2nd Ed. 1959, §337, comment o, p. 166; 2 *Page on Wills, Bowe-*

Parker Revision (1960) §25.5, p. 632; *In the Matter of the Estate of Dutton,* 347 Mich. 186, 79 N.W.2d 608; *Charlotte B. Quigley,* 1 Tax Court 831 (Rev. on other grounds. (C.A. 7th) 143 F.2d 27).

The Court of Appeals said, "Moreover, it is not without significance that the only doubts as to validity in the instant case are raised by the beneficiaries who seek to terminate the spendthrift trust by unanimous consent by invoking the family-settlement doctrine for the self-serving purpose of solving the controversy they have created." (App.A, *infra,* p. 8a).

In Illinois, as elsewhere, when a fiduciary relation exists between the testator and a trustee who is given very large discretionary powers as executor and trustee, including the control over a corporation and the power to determine his own salary, when the testator is the dependent and the executor-trustee, the dominant party, and the testator therefore reposes trust and confidence in the executor and trustee as in the ordinary relation of attorney and client, when the will is written or its preparation procured by that executor and trustee, proof of these facts establishes *prima facie* the charge that the execution of the will was the result of undue influence exercised by that executor-trustee and this proof standing alone and undisputed by other proofs entitles a contestant to a verdict. *Harrison* v. *City National Bank,* 210 F.Supp. 362; *Peyton* v. *William C. Peyton Corp.,* 23 Del. Chancery 321, 7 Atl. 2d 737, 123 ALR 1482, 1505; *In Re Lobb's Will,* 173 Ore. 414, 145 Pac. 2d 808; *Abbott* v. *Church,* 288 Ill. 91, 123 N.E. 306; *Gum* v. *Reep,* 275 Ill. 503, 114 N.E. 271; *Teter* v. *Spooner,* 279 Ill. 39, 116 N.E. 673; *Compher* v. *Browning,* 219 Ill. 429, 76 N.E. 678.

Petitioners are not claiming interests as beneficiaries of the spendthrift trust that Oscar's will, if valid, would create; they are claiming as heirs of their grandmother

and father and are contesting the validity of the will which would create the spendthrift trust. The three charities are not beneficiaries under the purported will; they are parties to the declaratory judgment action because Feigenholtz claims that if petitioners win the will contest, Kathryn's trust estate would descend to the charities, that Oscar's estate is insolvent (in the absence of any accounting) and that the amount in controversy does not exceed $10,000. Wesley Hospital is a contingent remainderman under Oscar's purported will that takes nothing, if the will is held invalid. Kenneth except for defending the will is in the same position as petitioners and is so treated in the settlement agreement. Estelle who is given one-third of the income under the settlement agreement but in any event not less than $12,000. a year for sixteen years testified that she has received nothing by way of income for the past several years and "there is nothing left." (App. 36).

On the merits of the declaratory judgment, (Count I) the Court of Appeals held that the provision in Kathryn's will, that if Oscar "shall fail to execute a Will, or if such Will shall not be admitted to probate, I hereby direct distribution" to three named charities, created a vested remainder in the three charities subject to the condition subsequent divesting the remainder if and whenever a will executed by Oscar and admitted to probate be sustained in a will contest and that the rule against perpetuities was not violated. (App.A., *infra*, pp. 9a-10a).

The court citing *Sternberg* v. *St. Louis Union Trust Company*, 394 Ill. 452, 459 held that the order admitting the will to probate (a jurisdictional prerequisite to a will contest and which establishes the will against collateral

attack) has no force or effect in a will contest. (App. A., *infra,* page 10a).

The court held that the provisions in Oscar's purported will directed distribution to three named children, not to a class and that the possibility of Oscar being survived by a posthumous child did not "precipitate" a violation of the Rule Against Perpetuities. (App. A., *infra,* page 11a)

The court did not discuss the following provision of the contested will: "In the event one of my beloved children predeceases me, or dies prior to the distribution of the Trust Estate, then and in that event, his or her portion of the income or principal of the Trust Estate shall be then divided among my remaining children." (App. 54).

The Court of Appeals held that the failure of the will to provide for any distribution in the event one surviving child attains the age of 40 but the youngest surviving child does not did not render the trust void for uncertainty. (App. A, *infra,* page 11a).

The Court of Appeals held that "the plaintiffs sought no accounting to Oscar's Estate" and that the trial court's declaration of rights adverse to plaintiffs' claim to the trust property as heirs of Kathryn and Oscar required dismissal of Count II of plaintiffs' complaint saying "Plaintiff's have no right to the accounting sought therein." (App. A., *infra,* page 12a).

K. THE INTERVENING DECISION OF THE ILLINOIS APPELLATE COURT.

In the meantime, Feigenholtz's attorney sought from the Probate Division of the Circuit Court of Cook County a partial allowance of fees earned in defending the will contest, the declaratory judgment proceedings, and the removal proceedings and in prosecuting his appeal to the

Supreme Court of Illinois from the order disapproving his account. The Probate Division allowed the Executor's attorney $45,000. on account and ordered Kathryn's trustees to pay such amount to him out of Kathryn's trust estate and to take credit for this in their accounts. Petitioners herein appealed from that order to the Appellate Court of Illinois, which, while the appeal below was pending, affirmed. *In Re Estate of Breault*, 63 Ill. App. 2d 246.

The Appellate Court after reviewing the proceedings in the Supreme Court said, "We assume, from the record before us, that respondents [petitioners herein] thereafter amended their federal action for declaratory judgment and accounting accordingly, because the amended Count II thereof filed after 29 Ill. 2d 165 seeks, in their behalf, such complete accounting." 63 Ill. App. 2d 246, 261.

In answer to the argument that an allowance of fees to the Executor's attorney out of Kathryn's trust estate was premature in that the declaratory judgment action contesting the validity of Oscar's appointment and the will contest contesting the validity of the will making the appointment were pending in the Federal Court, the Appellate Court said, at 63 Ill. App. 2d 246, 266:

> "Even if it should be eventually determined that the appointment was in fact defective, and the takers in default of the power of appointment are determined, the rule giving creditors of the donee's estate preference to the appointees, gives them preference to those takers after a defective appointment."

The Appellate Court quoted with approval from *Gilman* v. *Bell*, 99 Ill. 144, in which it was said, "where there has been a defective execution, the court will supply the defective execution of the power in favor of a purchaser, creditor, wife or child." 63 Ill. App. 2d 246, 264-265.

L. THE PETITION FOR REHEARING.

A petition for rehearing and a petition for rehearing *en banc* were filed in the Court of Appeals on March 8, 1966 and were denied on April 13, 1966 (Appendix C and D, *infra,* page 14a-15a).

VII.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals has decided an important state question in a way in conflict with applicable State law and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such as departure by a lower court, as to call for an exercise of this Court's power of supervision.

Diversity jurisdiction is a device expressly designed to achieve "equal justice under law." In *Guaranty Trust Company of New York* v. *York,* 326 U.S. 99, 111-112, this Court said:

> "Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors. *Bank of the United States* v. *Deveaux,* 5 Cranch 61, 87, 3 L. Ed. 38.
> And so Congress afforded out-of-state litigants another tribunal, not another body of law."

This Court also said in that case at page 105, "* * * Congress never gave, nor did the federal courts ever claim the power to deny substantive rights created by State law * * *."

More than twenty-five years ago, this Court rendered a series of decisions intended to implement the Rules of Decision Act: *Fidelity Union Trust Company,* et al v. *Field,* 311 U.S. 169; *Six Companies of California,* et al v. *Joint Highway District,* 311 U.S. 180; *West* v. *American Telephone and Telegraph Company,* 311 U.S. 223; *Stoner* v. *New York Life Insurance Company,* 311 U.S. 464; *Vandenbark* v. *Owens Illinois Glass Company,* 311 U.S. 538.

Since then, however, this Court has rarely taken a diversity case on the asserted ground that a court of appeals misapplied applicable State law. Cf: *King* v. *Order of United Commercial Travelers,* 333 U.S. 153. See, Stern and Gressman, *Supreme Court Practice,* 3rd Edition 1962, pp. 134-135.

It is understandable that this Court ordinarily places its confidence in the Courts of Appeal for interpretation of the law of a State in a circuit. *Hillsborough Tp.* v. *Cromwell,* 326 U.S. 620; *Spiegel's Estate* v. *Commissioner of Internal Revenue,* 335 U.S. 701, 707-708. This Court might even regard a federal court decision misinterpreting State law as merely episodic in that such decisions are not binding on State courts in cases involving *other parties.*

We urge, however, that in this case the decision below was plainly wrong and special reasons call for review. Occasional review of the manner in which courts of appeal apply the Rules of Decision Act is manifestly important in furtherance of the principles of equal justice under law. The Framers intended to further this principle by giving federal courts diversity power under Article III, Section 2 of the Constitution. Congress intended to further this principle by the Rules of Decision Act. 28 U.S.C. § 1652. This Court intended to further such principle in

Erie R. Company v. *Tompkins*, 304 U. S. 64, 74-76. In recognition of the principle this Court announces in paragraph 1(b) of its Rule 19 that among the matters that it considers of sufficient weight in granting certiorari are those in which a court of appeals has decided an important state question in a way in conflict with applicable State law.

We submit that a consistent refusal by this Court to review such cases can only tend to make courts of appeal lax in their efforts to interpret correctly State law. This is one area that these courts know is not likely to be subject to review. Non-residents who choose a federal forum to avoid local bias may in fact find that they have sadly erred; they may be far better off looking to State courts which must consider that their decisions will affect resident citizens too. A discrimination not previously considered is inherent in this case.

This case presents an apt vehicle for the re-examination of the manner in which federal courts are meeting their obligation to follow applicable State decisions. First, the power of a court of equity to settle *bona fide* controversies has heretofore been regarded as "well-established" in Illinois and elsewhere. The settlement of a will contests is favored by all courts. 42 ALR 2d 1319. To limit such power when the challenged instrument contains spendthrift provisions does violence to the principle, unsettles titles, and ham strings courts in disposing of complex litigation. James, *Illinois Probate Law & Practice*, 1951, § 11.17, p. 101. *Page on Wills*, Bowe-Parker Rev. (1960) § 25.5 p. 632.

Second, the failure of the court below to follow applicable Illinois decisions is exceptionally clear. See Bogert, *Trusts and Trustees*, 2nd Ed. 1962, § 1009, p. 571, James,

Illinois Law and Practice, 1951, § 11.17, p. 101; Statement of the Case, *supra*, pp. 16-22; Petition for Rehearing, pp. 2-17; Appellant's Brief in the Court of Appeals, pp. 26-36.

In short: *Wolf* v. *Uhlemann*, 325 Ill. 165, 183, announces the familiar general rule that "the members of a family are not privileged to alter the terms and provisions of a will *merely* for the convenience of the family or for the *sole* purpose of securing greater individual financial advantages than those specified in the will and intended by the testator." (Italics ours)

But *Wolf* also announces a second "well-established" rule that "courts of equity favor the settlement of disputes among members of a family by agreement rather than by resort to law. Where there is a reasonable or substantial basis for the belief or assurance that prolonged and expensive litigation will result over the proceeds or distribution of an estate, that the estate will be materially depleted and that the family relationship will be torn asunder, the parties interested therein are warranted in preventing such bona fide family controversy by a settlement agreement." 325 Ill. 165, 183. In such event, abrogation of the trust is not *merely* for the convenience of the beneficiaries.

In *Altemeier* v. *Harris*, 403 Ill. 345, the so-called family settlement did not meet the requirements of the second rule, which, however, was expressly recognized. Likewise in *Stein* v. *Continental Illinois National Bank & Trust Company*, 328 Ill. App. 3, 7, and in *Tree* v. *Continental Illinois National Bank & Trust Company*, 346 Ill. App. 509. (opinions rendered after Altemeier) the requisite substantial controversy was lacking; however the rule was clearly recognized and such cases must be followed by the federal courts. *Stoner* v. *New York Life Ins. Co.*, 311

U.S. 464; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 237; *Fidelity Union Trust Co.* et al v. *Field*, 311 U. S. 169, 177-178.

In *Thorne* v. *Continental Illinois National Bank and Trust Company*, 18 Ill. App. 2d 163, 175-176, the court said: "* * * no case cited, which permitted deviation from trust provisions, indicated that spendthrift clauses are to be considered in a different category than other trust provisions when permitting the deviation from the corpus restriction." In the Appellant's Brief in *Thorne* the trustee cited, *Altemeier*, *Tree* and *Stein*. In *Quigley*, 1 Tax Ct. 837, reversed on other grounds, C.A. 7, 1944, 143 F. 2d 27, the Tax Court said with respect to an Illinois family settlement: "The trusts certainly are no more impregnable than the will by which they were established."

In the instant case, the genuineness of the controversy cannot be seriously controverted. No lawyer claiming to have some expertise in the future interests field can read the district court's opinion, (App. 121, *In re Estate of Breault*, 250 F. Supp. 551) without having serious qualms about its correctness. Among other things it undertakes to water down the Rule Against Perpetuities in Illinois by a plain misinterpretation of *Monarski* v. *Greb*, 407 Ill. 281, App. 141. There the Supreme Court actually recognized the rule; it has vitality today. *Continental Illinois National Bank* v. *Llewellyn*, 67 Ill. App. 2d 171, 193-194. (January 1966). The Court of Appeals opinion undertakes to rewrite Kathryn's will to create a "vested remainder" out of what is clearly an executory devise. *Calvert* v. *Calvert*, 297 Ill. 22, 25-26; Carey & Schuyler, *Illinois Law of Future Interests*, 1941, §8, pp. 27-29; §11, p. 43; §299, p. 412.

But even if the declaratory judgment proceeding raised no substantial doubts about the validity of Kathryn's and

Oscar's wills, nevertheless the will contest is still at issue and untried. The facts that Oscar's purported will was drawn in Feigenholtz's law office when the latter occupied a dominant, fiduciary relationship towards Oscar, that Oscar was dependent on Kathryn's trust for whatever income he received, that Oscar had testified that he understood that whatever he received was a matter of the trustees' discretion, that Kathryn's will provided that the trustees had the power to terminate the trust and deliver the entire corpus to Oscar when the trustees "feel" that Oscar "has become competent to personally handle the corpus of this Trust", that the trustees did not deliver the corpus to Oscar, that Oscar's purported will gives Feigenholtz unlimited discretionary powers and permits him to continue to enjoy substantial income as president and counsel of the trust-owned company for which he has never accounted, show the substantial nature of the undue influence charges. There is a genuine controversy with respect to the validity of Oscar's contested will.

We add that Feigenholtz is an attorney and member of the bar of Illinois. Counsel herein are well aware that "it is highly improper for counsel on appeal to make groundless charges against fellow members of the bar and officers of the court." *United States* v. *Abrams,* C. A. 2, 1966, 357 F. 2d, 539, 551.

Third, it is not unreasonable that petitioners fear that local bias affected the interpretation of Illinois decisions by the court below.

This case involves an attempt in Illinois by Kentucky residents to bring a Chicago lawyer, well-known to the bench and bar of Illinois, to account for alleged derelictions as a trustee. But the opinion of the court below refers to

petitioners' efforts to settle the controversy with the beneficially interested parties as "for the *self-serving* purpose of solving the controversy *they* have created." (App. A, infra, p. 8a) (Italics ours)

The courts below block the efforts of the beneficially interested parties to terminate prolonged and expensive litigation by any settlement which does not maintain Feigenholtz as trustee in control of the trust and company from which he pays himself salaries, counsel fees and bonuses.

Petitioners have long sought an accounting to Oscar's estate from the inception of the trust. They claim a right to income which should have been paid to Oscar in his lifetime as Oscar's descendants entitled to their share of his estate. The Supreme Court of Illinois has held that petitioners have a remedy to compel an accounting from the inception of the trust. *In re Estate of Breault,* 29 Ill. 2d 165, 180. The Appellate Court of Illinois with Count II before it, has construed it as seeking such relief. *In re Estate of Breault,* 63 Ill. App. 2d 246, 261. But the court below affirms the dismissal of the accounting count, saying without factual basis: "The plaintiffs sought no accounting to Oscar's estate * * *" (App. A, *infra,* p. 11a) At the very least petitioners should have been given leave to amend if there was any doubt as to the relief sought.

The court below holds that should petitioners prevail in the will contest, the Kathryn Breault trust estate will descend to three charities named in her will. It is noteworthy that the court below does not give the three charities the right collaterally to attack the order admitting the will to probate or to file a will contest in their own behalf. They are given no rights to control the litigation. The effect of the holding is merely to support Feigen-

holtz' contention that Oscar's personal estate is insolvent [in the absence of an accounting], that petitioners, if successful, in the will contest can acquire no interest in Kathryn's estate and thus the will contest should be dismissed for want of jurisdictional amount.

It would not be unreasonable for petitioners to believe that Feigenholtz is being given undue protection and that they as children of Oscar Breault, grandchildren of Kathryn Breault, are considered outlanders, impertinent in their prolonged quest to bring a local lawyer to account.

We earnestly urge this Court to give more than "scant consideration" (See Stern and Gressman, *Supreme Court Practice,* 3rd Ed., 1962, p. 134) to this petition. An occasional review of the practical application by a federal court of the Rule in *Erie R. Company* v. *Tompkins,* and the Rules of Decisions Act would have a greatly needed therapeutic effect upon the administration of justice in the Northern District of Illinois and in the Seventh Circuit.

Respectfully submitted,

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